IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 480

WARDEN OF THE MARYLAND PENITENTIARY,
Petitioner,

v.

BENNIE JOE HAYDEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Fourth Circuit (R. 131-151) are reported at 363 F. 2d 647, sub nom. *Hayden v. Warden, Maryland Penitentiary.*

The Opinion of the United States District Court for the District of Maryland (R. 37-45) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 21, 1966 (R. 151). A Petition for Rehearing en banc was timely filed, and

on June 3, 1966, the United States Court of Appeals for the Fourth Circuit filed an Order denying Petition for Rehearing (R. 152). A judgment in lieu of mandate was issued to the United States District Court for the District of Maryland on June 13, 1966, and upon a Motion to Recall the Mandate, the judgment in lieu of mandate was recalled on July 13, 1966 pending the filing of a Petition for a Writ of Certiorari. The Petition for Writ of Certiorari was filed on August 25, 1966, and was granted on November 7, 1966 (R. 153). The Court has jurisdiction under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the Constitution of the United States permits reasonable seizures of relevant evidential material, obtained in the course of a reasonable search pursuant to a lawful arrest.

2. Whether experienced trial counsel, as part of trial tactics, may waive the accused's right to object to the introduction into evidence of certain items seized.

STATUTES INVOLVED

Amendment IV to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 41(b) of the Federal Rules of Criminal Procedure, Article 27, Section 551 of the Annotated Code of Maryland and Rules 522 d 2 and 885 of the Maryland Rules of Procedure are set forth in Petitioner's Appendix, *infra*.

STATEMENT OF THE CASE

Bennie Joe Hayden was convicted of robbery with a deadly weapon by Judge Michael J. Manley, sitting without a jury, in the Criminal Court of Baltimore on May 28, 1962 (R. 37-38, 92, 126-127). He was sentenced on June 8, 1962 to a term of fourteen (14) years in the Maryland Penitentiary, accounting from March 17, 1962 (R. 41). He did not appeal his conviction but did file a Petition for Relief under the Maryland Post Conviction Procedure Act, which was denied without the taking of testimony on May 24, 1963 (R. 23-25, 41, 133). On Application for Leave to Appeal from this action, the Maryland Court of Appeals remanded the case for an evidentiary hearing. *Hayden v. Warden,* 233 Md. 613, 195 A. 2d 692 (1963).

On remand, a hearing was held at which Mr. Hayden was represented by experienced counsel and at which Mr. Hayden testified (R. 42). After the testimony the post conviction judge again denied relief, holding "that the search of his home and the seizure of the articles in question were proper" (R. 26-27, 42-43, 133).

Mr. Hayden again filed an Application for Leave to Appeal to the Court of Appeals of Maryland, but before the Application could be acted upon, he requested to withdraw the Application and his request was granted (R. 28, 36-37, 43, 133).[1] On July 22, 1964 Mr. Hayden filed the instant habeas corpus proceeding (R. 8-15).

After a full evidentiary hearing, the United States District Court for the District of Maryland (Thomsen, C. J.) found that the arrest was legal since "the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house." (R. 44). Judge Thomsen also found that the search and seizure were reasonable and that the search was less extensive than the search approved in *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947) (R. 44). Judge Thomsen refused the relief requested by Mr. Hayden (R. 37-45).

On Mr. Hayden's appeal to the United States Court of Appeals for the Fourth Circuit, the Order of the District Court was reversed in a two-to-one decision. Both the majority Opinion and the dissenting Opinion agreed that the arrest was lawful as being one made in "hot pursuit" and also agreed that the extent of the search was reasonable since the house was small, was under the complete control of Mr. Hayden, the entire arrest and search lasted one hour, and the extent of the search did not exceed the limits tolerated in *Harris v. United States, supra* (R. 137).

Both the majority Opinion and the dissenting Opinion recognized that the seizure of two guns found in the flush

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[1] During the pendency of his Application for post conviction relief, Mr. Hayden had filed two habeas corpus petitions in the Federal District Court, both of which had been denied for failure to exhaust available State remedies. After Mr. Hayden's request to withdraw his Application for Leave to Appeal was granted, he filed three Petitions for Writs of Habeas Corpus, one in the Circuit Court for Washington County, and two in the Circuit Court for Prince George's County, all of which were denied (R. 43, 133).

tank of a toilet and their introduction into evidence was proper, but the majority Opinion held that even though the arrest was legal and the search was reasonable, the clothing which Mr. Hayden was wearing when he committed the felony and which he discarded immediately upon entering the house in order to avoid detection could not be seized because of decisions of this Court applying the Fourth Amendment to the Constitution of the United States. The dissenting Opinion pointed out the lack of logic in holding that the mere fact that a felon disrobes upon entering his house in order to avoid detection somehow immunizes the clothing from a reasonable search and seizure. The dissenting Opinion also stresses that the clothing was used by Mr. Hayden in committing the crime and may even have been used by him as a form of disguise. In conjunction with the denial of a rehearing en banc, Chief Judge Haynsworth of the United States Court of Appeals for the Fourth Circuit joined in the dissent and found that the search and seizure were reasonable and not prohibited by the Fourth Amendment to the Constitution of the United States, or by the decisions of this Court (R. 131-151). *Hayden v. Warden, Maryland Penitentiary,* 363 F. 2d 647 (1966).

The facts with regard to the arrest, search and seizure, and introduction of seized items into evidence which are pertinent in connection with this Court's review of the questions presented are as follows:[2]

An armed robbery in which approximately $363.00 was taken occurred at eight o'clock in the morning on March 17, 1962, on the premises of the Diamond Cab Company in Baltimore, Maryland (R. 38, 92-93, 132). Two cab drivers,

[2] Both the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland found the relevant facts to be essentially undisputed.

who were then within half a block from the scene of the robbery, followed the robber from the scene to a small row house at 2111 Cocoa Lane (R. 38-39, 97-99, 102-103, 132). One cab driver had followed in his cab and was able to notify his dispatcher on the cab radio of the fact that he observed the robber run into 2111 Cocoa Lane (R. 39, 99). He gave the dispatcher a description of the robber as a Negro about 5′ 8″ tall, wearing a light cap and a dark jacket, similar to a truck driver's uniform. The dispatcher immediately relayed all of this information to the police who were then proceeding to the scene of the robbery and who thereafter proceeded instead to 2111 Cocoa Lane (R. 34, 39, 49, 132).

The police arrived at 2111 Cocoa Lane within minutes of the time the robber had entered the house (R. 39, 102, 132). The police knocked on the door; Mrs. Hayden answered the door; she was told by the police that they believed a robber had entered the house; and she admitted the police without objection (R. 3, 34-35, 39, 50-51, 63-64, 67, 106, 118-119, 132). The police looked briefly around the first floor of the small house and saw there was no male hiding there. Therefore, one officer proceeded to the basement and two other officers proceeded upstairs (R. 39, 52-53, 56, 132).

The two officers who had proceeded upstairs, observed that Mr. Hayden, who was feigning sleep, was the only male in the house and they, therefore, asked him to get out of bed and get dressed; they thereupon arrested him (R. 39, 71-73, 132).

At about this time, one officer heard a toilet running in the bathroom adjacent to the bedroom in which Mr. Hayden was found. The officer placed his hand in the flush tank and seized a sawed-off shotgun and a pistol (R. 39, 59-61, 132).

While searching Mr. Hayden's room for the weapons and the money, the police found ammunition for the guns and

also found a sweater and a cap, similar to that described, under Mr. Hayden's mattress (R. 39, 61, 106-114, 119-120, 132-133).

The officer in the basement, in the course of his search to ascertain that no male was in the basement, saw a washing machine. While searching for either the man or the money, he looked into the washing machine and saw a jacket and a pair of pants to what looked like a truck driver's uniform, with the leather belt still in the trousers. These items also fit the description of the clothing the suspected robber was wearing at the time the offense was committed (R. 40, 56-57, 133).

All of the above items were found by the police within one hour of the time of their entry into the house to arrest Mr. Hayden (R. 40, 73-74, 137). Within one hour of the time of entry by the police, Mr. Hayden was taken from his home to police headquarters, and the search was terminated. The money was not found and Mr. Hayden gave no statement to the police (R. 40, 44, 137).

The seized items were admitted into evidence at Mr. Hayden's trial without any objection on the part of his privately retained counsel, who was very experienced in the trial of criminal cases (R. 40, 45, 106-109, 133).

At the trial Mr. Hayden's counsel cross-examined the identification witnesses very carefully as to the precise color of the clothing which the robber was wearing, and utilized the clothing in his cross-examination (R. 40, 96, 113-114). Mr. Hayden's counsel also stressed the fact that in spite of a very thorough search, no money had been found (R. 111-113).[3]

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[3] Trial counsel was apparently successful in stressing this point since the trial judge commented that the only missing link in the whole case was the fact that the search did not produce the money which had been taken (R. 126-127).

The State filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The Petition for Writ of Certiorari was granted on November 7, 1966.

SUMMARY OF ARGUMENT

I.

The Fourth Amendment only prohibits unreasonable searches and seizures. A review of the reasons for the adoption of the Fourth Amendment and the Fifth Amendment, and a review of the *Gouled*[1] and *Lefkowitz* cases[2] and their antecedents, illustrates that there is no historical justification for holding that the seizure of the clothing, here, was in any way unreasonable, within the meaning of that term under the Fourth Amendment, or was in any way violative of the Fifth Amendment protection against self-incrimination. Both *Gouled* and *Lefkowitz* involved the exclusion of incriminating documentary evidence which could have been excluded because each search was exploratory and, therefore, unreasonable in itself. However, the majority Opinion below relied on *Gouled* and *Lefkowitz* as establishing a "Rule"[3] which required the exclusion of non-documentary evidence — the clothing in the instant case. The "Rule" as applied by the majority Opinion requires an attempt to distinguish between relevant evidence which can be classed as means, fruits or contraband, and relevant evidence which cannot technically be so classed. There is no basis in history or logic for requiring such a distinction.

The entire court below recognized that this Court had never applied the "Rule" to non-documentary evidence.

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[1] *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921).

[2] *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932).

[3] See, Brief, page 14, for an explanation of use of "Rule".

Many courts at both the federal and state level, and many of the most informed writers in this area of the law, have questioned whether this Court ever intended the "Rule" to apply to non-documentary evidence. There is a distinction between private papers and non-documentary evidence, such as clothing, and, therefore, the "Rule" should not be extended to non-documentary evidence.

Even if the "Rule" is intended to and does apply to non-documentary evidence, such as the clothing in the instant case, the "Rule" is not applicable to the states under either the Fourth or Fifth Amendment. In *Ker v. California*,[4] eight of the justices joined in stating that "standards of reasonableness under the Fourth Amendment are not susceptible of Procustean application . . .", and the states are not "precluded from developing workable rules governing arrests, searches and seizures. . . ." In *Gouled* and *Lefkowitz* this Court could have achieved the same result by relying on the federal search warrant statute then in effect which was not applicable to the states. The "Rule" itself is constantly condemned as being unreasonable and most of the states have attempted to avoid the "Rule" by decision and by statute. The *Gouled* case does not necessarily establish the "Rule" as being of constitutional dimensions and, therefore, in the light of *Ker*, the "Rule" should not be applied to the states.

Schmerber v. California[5] removes any possible Fifth Amendment support for the "Rule", at least as applied to non-documentary evidence. *Schmerber* states that in requiring an individual to submit to the withdrawal and chemical analysis of his blood, the state has compelled him to submit to an attempt to discover evidence. That evidence does not fit the technical classification of means, fruits or contraband. Yet *Schmerber* holds that the with-

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[4] 374 U.S. 23, 33-34, 10 L. Ed. 2d 726, 737-738 (1963).
[5] 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

drawal and chemical analysis does not violate the privilege against self-incrimination. Such privilege only applies to evidence of a testimonial or communicative nature. Like the blood in *Schmerber*, the clothing here is not evidence of a testimonial or communicative nature. Therefore, seizure of the clothing does not violate the privilege against self-incrimination.

Schmerber also removes Fourth Amendment support from the "Rule", at least as applied to non-documentary evidence. This Court recognized that the blood was wanted solely for its evidential value and the blood could not be classed as either means, fruits or contraband. This Court held that the taking of the blood involved a search and seizure within the meaning of those terms under the Fourth Amendment. Therefore, when this Court found the search for and the seizure of the blood in *Schmerber* reasonable under the Fourth Amendment, it necessarily also found that the search for and seizure of the clothing here was reasonable under the Fourth Amendment.

After *Schmerber* has removed Fourth Amendment and Fifth Amendment support from the "Rule", at least as applied to non-documentary evidence, the "Rule" itself must fall as not being one of constitutional dimensions. If neither the Fourth Amendment nor the Fifth Amendment standing alone requires the exclusion of the clothing here, then no interaction of the two Amendments should require exclusion of the clothing.

The "Rule" is artificial and illogical. Law enforcement efforts are directed to obtaining relevant evidence. This Court has asked that greater emphasis be placed on scientific investigation. The "Rule" impedes this, without protecting any important right of the accused. The very same items which were excluded in the instant case would be admitted in evidence in only slightly different factual

situations. If Mr. Hayden was wearing the clothing when he was arrested, it could have been seized. If the clothing was a disguise, it was an instrumentality and could have been seized. Many courts would call the clothing here an instrumentality even if not used as a disguise, and would, therefore, approve the seizure. It is impossible to believe that an amendment to the constitution which demands reasonableness, requires the courts to make meaningless, unreasonable and illogical distinctions.

The "Rule" has caused much confusion and inconsistency in the courts, especially in the area of when an item is, and when it is not, an instrumentality of crime. Even this Court has had great difficulty in determining whether an item is or is not an instrumentality. The lower federal courts and the state courts have had even more difficulty. The majority Opinion below recognized that in order to avoid the "Rule" judges stretch to the point of distortion the category of instrumentalities of crime. This inconsistency and confusion among the courts promotes injustice. Some apologists for the "Rule" suggest that the distortion be carried even further. A "Rule" which encourages reasonable men to use distortion to avoid the "Rule" has outlived its usefulness.

In the beginning, there was hope that the "Rule" would help to prevent exploratory searches and unnecessary invasions of privacy. The "Rule" has accomplished nothing in this regard. Exploratory searches incident to a lawful arrest are condoned, if items technically classified as means, fruits or contraband are discovered, even if they relate to another crime other than the one for which an accused is subject to arrest.[6] If it is desired to limit exploratory searches this should be done by attacking the problem directly. The "Rule" achieves no legitimate purpose and

[6] *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947).

causes inconsistency and confusion. Therefore, the "Rule" should be abandoned.

II.

Maryland has a contemporaneous objection rule which has been consistently applied by the Court of Appeals of Maryland to deny relief on the ground of waiver where proper objection was not made in the trial court. The Maryland courts have recognized that such a rule has useful and sound objectives. This Court has recognized that a contemporaneous objection rule does serve a legitimate state interest.[7] The failure to make a contemporaneous objection deprives the state and the court of the right to decide not to use the evidence in order to avoid any possibility of error. In this case the decision not to object was an important part of the trial tactics of counsel.

The Court below did not consider waiver since the Court incorrectly believed that the Court of Appeals of Maryland had failed to apply the contemporaneous objection rule in this case. Since Mr. Hayden had not taken a direct appeal, the Court of Appeals of Maryland, in considering his Application for Leave to Appeal under the Post Conviction Procedure Act, did not have a transcript of Mr. Hayden's trial. Since there was no testimony taken at the post conviction hearing, the Court of Appeals of Maryland did not know whether or not a contemporaneous objection had been made. The Court of Appeals of Maryland, therefore, remanded so that the post conviction judge could hold a hearing which would meet all the tests of *Townsend v. Sain*,[8] in order to determine all the facts with regard to the introduction of the evidence including whether or not there had been a proper objection. The Court of Appeals of Maryland never had sufficient facts to determine

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[7] *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408 (1965).
[8] 372 U.S. 293, 9 L. Ed. 2d 770 (1963).

whether or not the contemporaneous objection rule was applicable. Now that the transcript of the trial is available, it is obvious that there was a failure to object and therefore a waiver.

There were no exceptional circumstances here which excused the failure to object. In fact, trial counsel had strategic reasons for not entering an objection to the introduction of the clothing into evidence. In *Henry v. Mississippi, supra,* this Court recognized that a counsel's trial strategy could waive an accused's rights to assert constitutional claims even where the strategy backfired. Trial counsel was widely experienced in criminal cases and was found by the District Court to have competently represented Mr. Hayden. Trial counsel must be the manager of any litigation and strategic decisions arrived at in good faith by competent counsel must be binding upon the defendant. To hold otherwise would encourage sterile and unimaginative defense counsel. Trial counsel for valid strategic reasons decided not to object. Therefore, the failure to object was a waiver which was binding upon Mr. Hayden.

ARGUMENT

I.

The Fourth Amendment to the Constitution of the United States Permits Reasonable Seizures of Relevant Evidential Material, Obtained in the Course of a Reasonable Search Pursuant to A Lawful Arrest.

A. The "Rule" Applied by the Majority Opinion of the United States Court of Appeals for the Fourth Circuit To Exclude the Non-Documentary Evidence (clothing) Is Historically Unjustified.

The Fourth Amendment to the Constitution of the United States only prohibits unreasonable searches and/or unrea-

sonable seizures. There is no basis in history or in logic to hold that the seizure of the clothing here was unreasonable within the meaning of that term under the Fourth Amendment.

The majority Opinion and the dissenting Opinion of the United States Court of Appeals for the Fourth Circuit recognized that the arrest was lawful, that the search was incident to the arrest and was reasonable, and that the seizure of all items other than the clothing was reasonable (R. 137, 146).

However, the majority Opinion held that *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921) and *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932) established a "Rule" which required the Court to hold that the clothing that Mr. Hayden wore when he committed the felony was not subject to seizure, even though it was discovered during a reasonable search of Mr. Hayden's home, pursuant to a lawful arrest of Mr. Hayden in "hot pursuit" (R. 137-138). The dissent vigorously disagreed. The majority felt constrained to apply the "Rule" though they and the dissent thought it was timely for this Court to expose the "Rule" to re-examination and reinterpretation (R. 144, 150).

The alleged "Rule" which the majority Opinion reluctantly felt constrained to follow is sometimes called the "Gouled Rule" or the "Mere Evidence Rule". In this Brief the "Rule" will be referred to as the "Gouled Rule" or the "Rule" and not by the misnomer "Mere Evidence Rule".

As shown by the facts in this case the evidence which may be excluded by the "Rule" is significant and relevant and is by no means "mere evidence". It should not be so called. The "Rule" if it really is a "Rule", must be recog-

nized for what it actually does. It requires that relevant evidence, reasonably obtained, be excluded if it cannot technically be classed as a means or instrumentality of committing a crime, the fruits of a crime, or contraband.

In *Gouled* and *Lefkowitz,* this Court said that some inter-action of the Fourth and Fifth Amendments to the Constitution of the United States, with apparent emphasis on the Fifth Amendment privilege against self-incrimination, required the exclusion of incriminating documentary evidence which could not be classified as means, fruits or contraband.[1] The establishment of such a "Rule" is in no way required by the Fourth or Fifth Amendment or any inter-action of the two. The one recent Note[2] which treats the "Rule" most favorably, and the one recent Comment[3] which most clearly documents the fallacy of the "Rule" both recognize that historically the rationale of such a "Rule" is open to question.

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[1] In the Brief in Opposition to Petition for Writ of Certiorari filed on behalf of Mr. Hayden in this Court at pp. 5-6, the Respondent recognizes the fact that emphasis has been placed upon the Fifth Amendment in the support for the "Rule". Respondent recognizes that all of the cases in this Court involving the "Rule" have dealt with private papers. The Respondent argued that since this case deals with clothing, which is readily distinguishable from private papers, this Court should not have granted the Petition for Writ of Certiorari. See also Shellow, "The Continuing Vitality of the *Gouled* Rule: The Search for and Seizure of Evidence, 48 Marq. L. Rev. 172, 174-175 (1964); Comment, "The Fourth and Fifth Amendments — Dimensions of an 'Intimate Relationship' ", 13 U.C.L.A. L. Rev. 857 (1966); Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 605-606, 623-625 (1966); Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 360-361 (1966); Comment, "Limitations on the Seizure of 'Evidentiary Objects' — A Rule in Search of a Reason", 20 U. Chi. L. Rev. 319-320 (1953).

[2] Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 597-600.

[3] Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 359-366.

The Fourth Amendment was adopted primarily for the purpose of forbidding the unlimited power to invade privacy by general warrants and writs of assistance, issued without probable cause, and there is no historical evidence that the Fourth Amendment was in any way premised on a self-incrimination concept.[4] It is interesting to note that in its original formulation, the Fourth Amendment would have provided that the right to be secure "against unreasonable searches and seizures shall not be violated by warrants issuing without probable cause, supported by oath or affirmation and not particularly describing the place to be searched and the person or things to be seized."[5] Therefore, an otherwise reasonable search, pursuant to a lawful arrest, or a search based on a warrant, which described the items to be seized with sufficient particularity, would not have been considered to be unreasonable within the meaning of that term in the Fourth Amendment merely because the search discovered relevant evidence which could not technically be classed as means, fruits or contraband.

The Fifth Amendment was adopted primarily to prevent the practice of compelling an accused to give evidence against himself.[6] A person subjected to a search is in no way required to assist the government in producing testimony for use against himself and need not act at all.

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[4] Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 365-366; Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L. Rev. 593, 597.

[5] Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 365-366.

[6] Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 597; Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 362.

Therefore, no element of self-incrimination is present in a search.[7]

That an otherwise reasonable search which produces relevant evidence which cannot be classed as means, fruits or contraband should not be considered unreasonable within the meaning of that term in the Fourth Amendment, and should not be considered to violate a person's privilege against self-incrimination under the Fifth Amendment, is further confirmed by an analysis of *Gouled* and *Lefkowitz* and their antecedents.[8]

Lefkowitz relied solely on *Gouled* when the "Rule" was discussed in the *Lefkowitz* Opinion.[9] *Gouled* relied on the case of *Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 746 (1886). The *Boyd* case found it to be a violation of the

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[7] See *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 110, cert. den. 384 U.S. 908, 16 L. Ed. 2d 361 (1966); Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 362. In a Comment which basically approves of the "Rule", "The Fourth and Fifth Amendments — Dimensions of an 'Intimate Relationship' ", 13 U.C.L.A. L. Rev. 857, 863-866, the author strongly suggests that the use of the Fifth Amendment at all in search and seizure cases is improper. The Comment was apparently written before this Court's Opinion in *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966) and does not cite *Schmerber*. In a subsequent section of this Brief, the State will urge that the *Schmerber* case completely removes both Fourth and Fifth Amendment support from the "Rule". As the State will point out in that section of the Brief, this Court did not qualify its removal of Fifth Amendment support from the "Rule" at least when non-documentary evidence is involved, and therefore the author's indication that the Fifth Amendment is improperly applied in search and seizure cases has been approved at least when considering non-documentary evidence. In the case of *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191-192 (1965), the Supreme Court of New Jersey also seemed to predict the *Schmerber* holding, which totally removes Fifth Amendment support from the "Rule", at least as to non-documentary evidence.

[8] *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932).

[9] *United States v. Lefkowitz*, 285 U.S. 452, 464-465, 76 L. Ed. 877, 882 (1932).

Fifth Amendment to the Constitution of the United States to compel the production by subpoena of a self-incriminating document. As indicated previously, a search and seizure does not compel a person to actively produce testimony for the government, but a subpoena does require active participation. There is some possible justification for applying the Fifth Amendment in the *Boyd* factual situation, but that justification is not carried over to the factual situations of either *Gouled or Lefkowitz*.[10]

The *Boyd* case did indicate that a combination of the Fourth and Fifth Amendments to the Constitution of the United States required a finding that the issuance of the subpoena was improper.[11] In finding a violation of the Fourth Amendment, the *Boyd* case relied heavily on the English case of *Entick v. Carrington*, 19 Howell State Trials 1029 (1765). However, in *Entick*, that which was condemned was a general warrant issued by the Secretary of State which lacked particularity, had been issued without a show of probable cause, and which authorized and resulted in an indiscriminate search among, and a seizing of, the plaintiff's private papers.[12]

It is therefore, apparent that *Entick* would stand for the proposition that a restricted search pursuant to a lawful arrest, carried on in a reasonable manner, or a search under a warrant issued upon probable cause, stating with particularity the items to be seized, would be reasonable, even if the relevant evidence found could not be classed as means, fruits or contraband.

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[10] See Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 362.

[11] *Boyd v. United States*, 116 U.S. 616, 622, 29 L. Ed. 746, 748 (1886).

[12] See *Boyd v. United States*, 116 U.S. 616, 626, 29 L. Ed. 746, 749 (1886); Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 364-365.

It has been argued with considerable justification, with regard to *Gouled* and *Lefkowitz*,[13] that the search in each case was itself exploratory and, therefore, unreasonable under the Fourth Amendment, whether or not the relevant evidence actually found, technically, could be included in the classification of means, fruits or contraband.[14] The State contends that *Gouled* and *Lefkowitz* rely on a combination of the type of search and the type of item searched for to find that the search, not the seizure, is unreasonable under the Fourth Amendment.

The majority Opinion requires an attempt to distinguish relevant evidence which cannot be classed as means, fruits or contraband, from relevant evidence which can be classed as means, fruits or contraband, without any basis in history or logic for requiring Courts to make such a distinction. In the very few cases in which the distinction was set out, and was purportedly used to exclude relevant evidence, it was apparent that the evidence could have been excluded without making the distinction. Therefore, a distinction between means, fruits and contraband and other relevant evidence is not required by either the Fourth or Fifth Amendment to the Constitution of the United States.

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[13] *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932).

[14] E.g., in *Golliher v. United States*, 362 F. 2d 594, 599 (8th Cir., 1966), the Court upheld the seizure of clothing from the person of the individuals arrested and indicated that in *Gouled v. United States* and *United States v. Lefkowitz* this Court merely rightfully condemned general exploratory searches. See also *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191 (1965). (In *Bisaccia*, the Court found that browsing among private papers from its very nature involves an exploratory search which is indistinguishable from a search under a general warrant which would be outlawed by the Fourth Amendment); *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 112 (1966). (In *Thayer* the Court states that in every instance the central issue is the legality of the search, not the legality of the seizure, and when the search is so broad as to be exploratory, then the "Rule" is used as an alternative and superfluous ground for exclusion.)

B. The "Rule" Was Not Meant To Apply To Non-Documentary Evidence.

The entire Court below recognized that this Court has never applied the "Rule" to non-documentary evidence (R. 139, 149). The majority Opinion further recognized that *Gouled* and *Lefkowitz*[15] are the only two cases in which this Court has applied the "Rule" to exclude even documentary evidence.[16] The majority Opinion applied the "Rule" to the clothing here since the majority perceived no "rational distinction" between private papers that are of evidential value only and articles of clothing which are of the same character (R. 142).

There is a very valid "rational distinction" between private papers that are of evidential value only and articles of clothing that are alleged to be of evidential value only, and the Supreme Court of New Jersey so well expressed the distinction in the case of *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191-192 (1965), that the exact language of that Court is set forth in the footnote below.[17] Chief Judge

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[15] *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932).

[16] Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 368-369.

[17] "There is a marked difference between private papers and other objects in terms of the underlying value the Fourth Amendment seeks to protect. As we have said, private papers are almost inseparable from the privacy and security of the individual. To browse among them in search of anything inculpatory involves an exploratory search indistinguishable from the search under the general warrant which the Fourth Amendment intended to outlaw. . . . Indeed, even a search for a specific, identified paper may involve the same rude intrusion if the quest for it leads to an examination of all of a man's private papers. Hence it is understandable that some adjustment may be needed, and presumably it is to that end that a search may not be made among a man's papers for a document which has evidential value alone. Even as to private papers, this 'mere evidence' limitation upon

Haynsworth also recognizes a distinction between the search for and seizure of a diary containing incriminating entries and the search for and seizure of clothing (R. 149-150).

The Supreme Court of New Jersey reviewed the history of the "Rule" going back to the case of *Entick v. Carrington*[18] and indicated that in the *Entick* case Lord Camden did not find any restraint on the Crown's right to search, but in order to protect the innocent from oppression a "paper-search" under the general warrant was intolerable.[19]

Unfortunately, the Fourth Circuit did not have the benefit of this Court's decision in the case of *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966). If it had, the result below might have been different. In a subsequent section of this Brief the State will contend that the *Schmerber* case completely strips any Fifth Amendment support from the "Rule", at least as applied to non-documentary evidence. Once it is clear that the Fifth Amendment privilege against self-incrimination cannot be used as part of the justification for the "Rule", then the

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a search is not an easy line to defend, but Judge Learned Hand did find in it a redeeming feature . . .

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"But a search for other tangibles involves none of the hazards which concerned the courts in Entick and Boyd. There is no rummaging through a man's private files, no exposure of their intimacies and confidences. We must remember that the Fourth Amendment prohibits 'unreasonable' searches and seizures and that the rule of Boyd is simply an application of the rule of unreasonableness to the specific subject matter there involved. When that rule or any other subsidiary rule evolved in the application of the Fourth's prohibition against unreasonableness is sought to be applied beyond the setting in which the subsidiary rule was devised, we must measure the proposed application against the basic test laid down in the Amendment itself and ask whether the search or seizure is unreasonable." (Citations omitted.)

[18] *Entick v. Carrington*, 19 Howell State Trials 1029 (1765).

[19] *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 190 (1965).

"rational distinction" between private papers and articles of clothing becomes even more apparent.

On two occasions the United States Court of Appeals for the District of Columbia Circuit apparently applied the "Rule" to exclude non-documentary evidence even though it was not necessary in either case to utilize the "Rule".[20] Other courts at both the federal and state level, and many of the most informed writers in this area of the law have seriously questioned whether the "Rule" ever was intended by this Court to apply to non-documentary evidence.[21]

While this Court has indicated that there is no special sanctity given to documents, that language was used by this Court to justify the fact that even documents may be seized when they fit into the technical category of means, fruits or contraband.[22] This language in the context in

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[20] *Morrison v. United States*, 262 F. 2d 449, 450 (D.C. Cir., 1958); *Williams v. United States*, 263 F. 2d 487, 488 (D.C. Cir., 1959). In *Morrison*, the officers entered the house of Morrison without a warrant, after knocking and receiving no answer, and engaged in the search knowing that Morrison was not there. The search itself was unreasonable. In *Williams* there was no search warrant and no arrest and the Court believed that none of the conditions for a reasonable search existed.

[21] E.g. *Gilbert v. United States*, 366 F. 2d 923, 933 (9th Cir., 1966); *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191. Even so staunch an exponent of individual liberties as Professor Kamisar, in addition to criticising the "Rule" as unsound and undesirable, indicated that the application of the "Rule" in *Morrison v. United States*, 262 F. 2d 449 (D.C. Cir., 1958) to the handkerchief seized therein, was questionable, and stated that it is not clear even in the federal courts that the "Rule" extends to non-documentary evidence. Kamisar, "Public Safety v. Individual Liberties: Some 'Facts and Theories' ", 53 J. Crim. L., C. & P. S. 171, 177 (1962). See also Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 368-369; Comment, "Limitations on the Seizure of 'Evidentiary Objects' — A Rule in Search of a Reason", 20 U. Chi. L. Rev. 319 (1953).

[22] *Gouled v. United States*, 255 U.S. 298, 309, 65 L. Ed. 647, 652 (1921); *United States v. Kirschenblatt*, 16 F. 2d 202, 204 (2d Cir., 1926).

which it was used cannot support an unjustified application of the "Rule" to non-documentary evidence.

This Court has never applied the "Rule" to non-documentary evidence. The "Rule" itself even as applied to documentary evidence has been severely criticised. When other courts have felt required by the decisions of this Court to extend the "Rule" to non-documentary evidence, such extension has been severely criticised. There is no possible justification in history or in logic for extending the "Rule" to non-documentary evidence.

C. THE FOURTH AMENDMENT DOES NOT REQUIRE THAT THE "RULE" BE APPLIED TO THE STATES.

In that part of the Opinion in *Ker v. California*[23] in which eight of the justices joined (Justice Harlan, who did not join, expressed the view that the Fourth Amendment is not applicable to the states and that in judging state searches and seizures he would continue to adhere to the established Fourteenth Amendment concepts of fundamental fairness), it was stated that:

> "The Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution."
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> "The States are not thereby precluded from developing workable rules governing arrests, searches and sei-

[23] *Ker v. California*, 374 U.S. 23, 33-34, 10 L. Ed. 2d 726, 737-738 (1963).

> zures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

It appears from the language quoted above that not all of the cases in the federal courts which considered the reasonableness of searches and seizures would be binding upon the states. Where evidence is held inadmissible as a result of this Court's supervisory power over inferior federal courts, the states would not be required to follow the federal lead. It has been suggested that though the *Gouled* case [24] indicated that the Fourth and Fifth Amendments were being applied in order to exclude the incriminating documentary evidence involved, the use of the Fourth and Fifth Amendments was unnecessary to the decision since the decision could have been based upon a statute and on this Court's supervisory power.[25]

Since shortly prior to the time of *Gouled* to the present, there has been a federal statute or rule which purports to limit the types of items which may be seized under a search warrant. The statute involved at the time of *Gouled* was the Act of June 15, 1917, Chapter 30, 40 Stat. 228, which was the first general search warrant statute and is nearly identical to the present Rule 41(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. 41(b).[25a] *Gouled* and all later cases could mean that the search is unreasonable in federal cases since it is not authorized by the federal statute or the federal rule involved.

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[24] *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921).

[25] See *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 111; Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 360, footnote 34.

[25a] Ibid.

In addition, the State contended in a previous section of this Brief that in the cases in which the "Rule" was used to exclude incriminating documentary evidence, the Court apparently found the search to be exploratory both in and of itself and because of the type of item being searched for. Such a combination theory to find the search and not the seizure to be exploratory and, therefore, unreasonable, would necessarily be part of the Court's supervisory power rather than a constitutional prohibition applicable to the states.

In spite of this, the Majority Opinion in the Fourth Circuit held that the "Rule" is one of constitutional dimensions. The Supreme Court of California disagreed.[26] That Court cited *Ker*[26a] and recognized that:

> "Federal rules based on the supervisory powers of the United States Supreme Court over the administration of justice in the federal courts, however, are not binding on the states."[27]

Whether or not this Court believes that the "Rule" should retain any validity in the federal courts as the result of this Court's supervisory power over the federal courts, this Court should hold that it will not, like Procrustes, tie the states and their reasonable search and seizure rules upon an iron bed and then shape them to conform to the size of the bed. If, as was said by eight of the justices in *Ker*, the states are to be allowed to develop workable rules governing searches and seizures, this particular area of searches and seizures should be left to the states for their own determination.

The "Rule" as applied below is itself unreasonable. Such an application has been consistently condemned. As the Supreme Court of California states:

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[26] *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 112.
[26a] *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726 (1963).
[27] *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 110.

> "The asserted rule that mere evidence cannot be seized under a warrant or otherwise is condemned as unsound by virtually all the modern writers."[28]

Even the majority Opinion below suggested that this Court expose the "Rule" to re-examination and reinterpretation (R. 144).

Most of the states which have been faced with the problem have indicated displeasure with the "Rule" whether or not they felt constrained to follow it.[29] It is interesting to note that seven States — New York, Illinois, Minnesota, Oregon, Vermont, California and Nebraska — have recently enacted statutes specifically authorizing the issuance of a search warrant for evidentiary matter.[30]

The Maryland statute[31] does not specifically mention purely evidentiary matter, but the Maryland cases under the statute have authorized the search for and seizure of items which do not fit into the classification of means, fruits or contraband.[32]

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[28] *People v. Thayer,* 47 Cal. Rptr. 780, 408 P. 2d 108, 109.

[29] E.g. *State v. Bisaccia,* 45 N.J. 504, 213 A. 2d 185; *People v. Thayer,* 47 Cal. Rptr. 780, 408 P. 2d 108; In the case of *State v. Coolidge,* 106 N.H. 186, 208 A. 2d 322, 333 (1965) the Court indicates that in the absence of a specific statutory restriction, the Courts usually hold that any property may be seized which will furnish proof of crime.

[30] Note, *"Evidentiary Searches: The Rule and the Reason",* 54 Geo. L.J. 593, 594; In addition, New Jersey also has such a statute. See *State v. Bisaccia,* 45 N.J. 504, 213 A. 2d 185, 186 (1965); Nevada also has such a statute. See *Eisentrager v. State,* 79 Nev. 38, 378 P. 2d 526 (1966).

[31] Article 27, Section 551, Annotated Code of Maryland (1966 Cumulative Supplement). The statute authorizes the issuance of a search warrant to seize any property found liable to seizure under the criminal laws of the State.

[32] *Davis v. State,* 236 Md. 389, 397, 204 A. 2d 76, 81 (1964) — bloodstained shoes and clothing in a murder case; *Matthews v. State,* 228 Md. 401, 403, 179 A. 2d 892, 893 (1962) — soiled sheets in prosecution for keeping a disorderly house; *Shorey v. State,* 227 Md. 385, 389, 177 A. 2d 245, 247 (1962) — bloodstained clothes and soiled trousers in a rape case; *Lucich v. State,* 194 Md. 511, 516, 71 A. 2d 432, 434 (1950) — laundry slips in a prosecution for keeping a disorderly house.

Consistent displeasure with the "Rule" is evidence of its own unreasonableness. It should not be applied to the states in the name of a constitutional amendment which itself asks only for reasonableness. Since the *Ker* case[33] shows the way to give some latitude to the state courts, and since *Gouled*[34] does not necessarily require that the distinction between means, fruits and contraband and other relevant evidence is of constitutional dimensions, this Court should not apply the "Rule" to the states.

D. THE SCHMERBER CASE[35] ESTABLISHES THAT THE CLOTHING IS PROPERLY ADMISSIBLE IN EVIDENCE UNDER BOTH THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

1. *Under the holding in Schmerber, the seizure of the clothing does not involve the privilege against — self-incrimination under the Fifth Amendment.*

The Petitioner in the *Schmerber* case had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had been driving. The police desired that Schmerber submit to a blood test in order to have his blood analyzed to determine the percentage of alcohol in his blood. The Petitioner, on advice of counsel, refused to consent to a blood test. In spite of the refusal of Schmerber to submit to the blood test, at the direction of a police officer, a blood sample was withdrawn from Schmerber's body by a physician. The analysis of the sample taken indicated intoxication and this was admitted at the trial. Schmerber was convicted of driving an automobile while under the influence of intoxicating liquor. This Court in *Schmerber* realized that in requiring an individual to submit to the withdrawal and

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[33] *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726 (1963).
[34] *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921).
[35] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

chemical analysis of his blood, the State compelled him to submit to an attempt to discover evidence which could be used against him[36]. It is obvious that the evidence which the State compelled him to produce does not fit into the technical classification of means, fruits or contraband. A man's own blood is neither the means nor the fruits of a crime and is, of course, not contraband. Even though Schmerber was compelled to produce for the State relevant evidence against himself which could not be classed as means, fruits or contraband, this Court held that such withdrawal and chemical analysis of blood does not violate a person's privilege against self-incrimination under the Fifth Amendment. This Court held that the Fifth Amendment privilege against self-incrimination only applies to compelling an individual to provide the State with evidence of a testimonial or communicative nature.[37]

Like the blood in *Schmerber*, the clothing here is not evidence of a testimonial or communicative nature. Therefore, after *Schmerber*, there can be no contention that the Fifth Amendment in any way precludes the admission into evidence of the clothing in the instant case. There was far less compulsion to incriminate and far less invasion of privacy in obtaining the clothing in this case than in obtaining the blood in the *Schmerber* case.

Since the Fifth Amendment privilege against self-incrimination has been such a vital part of any effort to explain or justify the "Rule", the fact that *Schmerber* establishes that the Fifth Amendment does not apply with regard to non-documentary evidence indicates that at least as to non-documentary evidence the "Rule" has no further validity.

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[36] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 914 (1966).

[37] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 914 (1966).

2. *Under the holding in Schmerber*[38] *the search for and seizure of the clothing was reasonable under the Fourth Amendment.*

In the *Schmerber* case, after completely stripping any Fifth Amendment support from the "Rule" as applied to non-documentary evidence, this Court next completely removed Fourth Amendment support from the "Rule". This Court said:

> "We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

The above quotation as applied to the instant case could be paraphrased somewhat in the following manner: We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the tangible effects of a person being arrested, for clothing to be analyzed, for bloodstains, semen stains, paint scrapings, or just to identify the clothing worn during the commission of the felony, "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

A comparison of the factual situations in *Schmerber* and in the instant case can only establish that the seizure here is more easily justified than the seizure in *Schmerber* and that the manner in which the item was seized was at least as proper. In this case the police had the right

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[38] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

and duty to be in the house, and the right and duty to be searching for the weapon and the money. In the course of that search the clothing was found. No greater intrusion on Mr. Hayden resulted in the discovery of clothing. Any reasonable man would have recognized the relevance of the clothing since it had been described by the eye-witnesses and the condition of the clothing, with the leather belt in the pants, indicated that it was discarded in haste. To say that there would be anything improper in taking the clothing under these circumstances, and yet to say that the taking of a man's blood against his will is proper, would only increase the confusion surrounding the "Rule" and only increase the great distaste generally felt toward the "Rule".

This Court recognized in *Schmerber* that the blood was wanted solely for its evidentiary value[39] and, of course, could not be classified as either means, fruits, or contraband. This Court held that the taking of the blood under the circumstances involved a search and seizure within the meaning of the Fourth Amendment.[40] Immediately thereafter this Court said that since it was not dealing with property relationships, the Court could write on a clean slate. With this language the State respectfully disagrees. A man's blood is his property just as surely as his personal

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[39] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 915 (1966). This Court said:

> "The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, *is evidence of criminal guilt*. Compelled submission fails on one view to respect the 'inviolability of the human personality.' Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused 'by its own independent labors.' " (Emphasis supplied.)

[40] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 915 (1966).

effects, such as clothing, are his property.[41] Therefore, this Court was dealing with property relationships in *Schmerber* and it did not write on a clean slate. When this Court found a search for and seizure of the blood in *Schmerber* reasonable within the meaning of that term under the Fourth Amendment, this Court, necessarily, also found that the search for and the seizure of the clothing, here, was reasonable within the meaning of that term under the Fourth Amendment.

This Court has consistently indicated that only unreasonable searches or seizures are prohibited by the Constitution. In the case of *Harris v. United States,* 331 U.S. 145, 150, 91 L. Ed. 1399, 1405 (1947) this Court said:

> "This Court has also pointed out that it is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.'"

In *United States v. Rabinowitz,* 339 U.S. 56, 63, 94 L. Ed. 653, 659 (1950), this Court said:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

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[41] It is common knowledge that many individuals make a practice of selling their blood a pint at a time. It is also common knowledge that when an individual needs a blood transfusion in a hospital, unless the individual and his family and friends replace the amount of blood he receives, pint by pint, then the individual must pay an additional charge for the blood he has received over and above all other hospital charges associated with the transfusion.

Under the facts and circumstances in the instant case, neither the search nor the seizure can be found to be unreasonable. Since it is reasonable within the meaning of the Fourth Amendment for a law enforcement officer to take a man's blood, against his will, and without a warrant, solely in order to use the result of a chemical analysis in evidence, it is also reasonable within the meaning of the Fourth Amendment to seize, as part of a reasonable search, the clothing worn while committing the felony, which was observed by the witnesses to the felony.

Mr. Schmerber, after being arrested, was required to submit to the further indignity and the further invasion of his privacy, of having his blood withdrawn from him against his will. In this case, Mr. Hayden suffered no further indignity or invasion of his privacy, since the search was being conducted legally and reasonably in order to find the other means of committing the crime (the weapon used, which was found) and the fruits of the crime (the money taken, which was not found).

This Court in *Schmerber* recognized that a search warrant could have been procured in order to obtain the blood from Mr. Schmerber. This Court held, however, that it was reasonable not to obtain the warrant before taking the blood since the "evidence" might be destroyed.[42]

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[42] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 919-920. It is interesting to note that in the case of *Trupiano v. United States*, 334 U.S. 699, 92 L. Ed. 1633 (1948) this Court held that in a search incident to an arrest, the search and seizure would be unreasonable within the meaning of that term under the Fourth Amendment if there was time to obtain a search warrant and a search warrant was not obtained. Two years later, in *United States v. Rabinowitz*, 399 U.S. 56, 94 L. Ed. 653 (1950) this Court overruled *Trupiano* and found that the failure to obtain a search warrant did not necessarily make the search and seizure unreasonable under the Fourth Amendment.

In *Schmerber*, while the officer could have believed that the analysis of the blood was quite vital, he also should have known that since he, and at least one independent third party, the doctor, was available to testify as to Mr. Schmerber's intoxicated condition, the immediate seizure of the blood might not have been crucial. In the instant case, only the officer had seen the clothing and the condition it was in, in the washing machine. If he had not taken it, it could have been destroyed.

In any event, if it is conceded that the officer could have testified as to what he saw in a reasonable search, it is illogical to say that he could testify about the clothes, but could not take them. A picture is worth a thousand words, and having the clothing in court, in the same condition in which it was found, is much fairer to the law enforcement officials and to the accused himself.[43]

For all of the above reasons, it is obvious that the seizure of the clothing here was even more reasonable within the meaning of that term under the Fourth Amendment than the seizure of the blood in *Schmerber*. Since all that the Fourth Amendment asks for is that a search be reasonable and the seizure be reasonable, there was no violation of Mr. Hayden's rights under the Fourth Amendment when the clothing was seized and admitted into evidence.

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[43] It is quite possible that if the officer had not seized the clothing a claim could have been made by the accused, that the State was suppressing evidence. This point will be discussed further in a section of this Brief covering waiver by failure to object. In that section the State will contend that Mr. Hayden's experienced trial counsel wanted the clothing in evidence so that he could attempt to test the credibility. and the ability to distinguish colors, of the various witnesses.

3. *Under the holding in Schmerber*[43a] *the rationale for the "Rule" fails, at least with regard to non-documentary evidence.*

Once the Fourth Amendment and Fifth Amendment support is stripped from the "Rule", at least as applied to non-documentary evidence, such as the clothing in the instant case, the "Rule" itself must fall, as not being one of constitutional dimensions. The one Comment which treats the "Rule" most favorably offers a rationale for the "Rule" which seems to lose all its vitality in the light of the *Schmerber* case holding that neither the Fourth Amendment, nor the Fifth Amendment, bars the compulsory search for and seizure of the blood of an individual for use as testimony against him. The author of the Comment states:

> "*Boyd* and *Gouled* offer a rationale as simple as it is sound. The fifth amendment forbids any form of compulsion to obtain evidence from the accused. A search warrant, commanding obedience under pain of law is a form of compulsion. Therefore, a search warrant may not issue for the *sole* purpose of forcing an accused to turn over *his* property to the government so that the latter may introduce it against him at trial. Thus read, *Gouled* does indeed seem to be a rule with a reason founded upon history, precedent, and logic. And, thus read, there seems to be no valid reason for a differentiation between property of the defendant that happens to be papers or books and other types of property. . . ." (Footnotes omitted).[44]

After *Schmerber* this rationale is no longer valid as applied to non-documentary evidence and may not be valid

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[43a] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

[44] Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 605-606.

even as to documentary evidence. There is no Fifth Amendment limitation on compelling production of non-documentary evidence since such evidence is not of a "testimonial" or "communicative" nature. There is no Fifth Amendment limitation on a search for documentary evidence because there is no compulsion upon the individual to actively produce the evidence for use by the government against him. He only passively submits to the search.

After *Schmerber* a comparison of the reasonableness of the seizure of the blood from Schmerber with the seizure of the clothing here can only establish that the seizure of the clothing here was more reasonable than the seizure of the blood in *Schmerber*. After *Schmerber* it must be conceded that when officers as part of a reasonable search, pursuant to a lawful arrest, discover and seize relevant evidence which can be classed as means, fruits or contraband, and also discover and seize relevant evidence which technically cannot be classed as means, fruits or contraband, both seizures are reasonable within the meaning of that term under the Fourth Amendment.

Therefore, after *Schmerber*, the rationale suggested by the Comment[45] amounts to this — the seizure of the clothing taken from Mr. Hayden's home is not barred by the Fifth Amendment standing alone, since the clothing is not of a "testimonial" or "communicative" nature; the seizure would not be barred by the Fourth Amendment standing alone, since both the search and the seizure were reasonable under the circumstances and in no way subjected Mr. Hayden to indignities or invasions of privacy over and above the search for and seizure of the guns and the money

[45] Comment, "Evidentiary Searches: The Rule and the Reason", 45 Geo. L.J. 593, 605-606.

(implements and fruits); therefore, the seizure should not be barred by any interaction of the two Amendments.

After *Schmerber* there is no possible justification for this Court to allow the "Rule" to apply to the clothing here, based upon the rationale suggested in the Comment or upon any other rationale.

The United States Court of Appeals for the District of Columbia Circuit (the Court which apparently applied the "Rule" to non-documentary evidence in the case of *Morrison v. United States*, 262 F. 2d 449-450 (D.C. Cir., 1958) and *Williams v. United States*, 263 F. 2d 487, 488 (D.C. Cir., 1959)) apparently believes that it is possible that the *Schmerber* case[46] has foreshadowed the doom of the "Rule" and cast doubt on the validity of the *Morrison* and *Williams* decisions.

In the case of *Fuller v. United States*, No. 19532, (Criminal No. 898-64), that Court requested supplemental memoranda on the implications of the *Schmerber* case, on the "Rule", when *Schmerber* was decided after the oral argument in *Fuller*. The facts of the *Fuller* case, as taken from the several Briefs of the Appellant and the *Appellee*, are that Fuller gave an oral confession in which he described the clothing he was wearing on the night of the rape-murder involved and informed the police that the clothing he wore was at his home. A search warrant was issued for this apparel and the warrant was executed and the clothes seized. If the United States Court of Appeals for the District of Columbia Circuit believed that the "Rule" which it approved in the *Morrison* and *Williams* cases retained any validity after *Schmerber*, that Court probably would have followed its own decisions in *Morrison*

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[46] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

and *Williams* and would have excluded the evidence.[47] The Court, instead, requested the supplemental memoranda.

In Nedrud, "The Criminal Law 1967", Sample Section (October, 1966) the author states that after *Schmerber*:

> "It is arguably settled that purely evidentiary matter can be seized whether as incident to arrest or even as the subject matter involved in a search warrant, thereby clarifying the question lingering in *Gouled v. United States*, 255 U.S. 298 (1921) and *United States v. Lefkowitz*, 285 U.S. 452 (1932) although these cases were not mentioned as such." At A-7.

Since *Schmerber* establishes that neither the Fourth Amendment nor the Fifth Amendment standing alone would bar the seizure of the clothing and its admission into evidence, there is no justification whatever for saying that any combination of the two Amendments requires exclusion.

E. The "Rule" As Applied to the Factual Situation Below and Other Similar Factual Situations Is Artificial and Illogical.

Even if we assume *arguendo* that the "Rule" has historical justification, is of constitutional dimensions and is applicable to the states, and *Schmerber*[48] does not abolish the "Rule", the "Rule" does not make sense when applied to a factual situation such as the one in the instant case.

Even persons whose point of view is basically defense-minded, criticize the logic of the "Rule":

> "At the outset, the rule would seem to contravene common sense. It appears, particularly to those authors

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[47] Another recent decision of a circuit court appears to cite *Schmerber* for the proposition that the police may seize clothing. *Hancock v. Nelson*, 363 F. 2d 249, 252 (1st Cir., 1966).

[48] *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

> whose philosophical orientation favors the prosecution, that it is absurd to deny to searching officers the right to seize evidence of the very crime for which they have established probable cause. Even to those authors whose perspective ordinarily is that of defense counsel, the *Gouled* rule appears an unwarranted extension of constitutional sanctions and a serious threat to effective law enforcement." (Footnotes omitted.)[49]

In *Mapp v. Ohio*, 367 U.S. 643, 657, 6 L. Ed. 2d 1081, 1091 (1961) this Court said:

> "There is no war between the Constitution and common sense."

Common sense dictates that law enforcement efforts be directed toward obtaining relevant evidence to help convict those who commit crimes. In the case of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 715 (1966), this Court said:

> "[O]ur accusatory system of criminal justice demands that the Government seeking to punish an individual, produces the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

Chief Judge Haynsworth points out that this Court, in cases such as *Miranda*, has admonished the police to rely less on evidence of a "testimonial" or "communicative" nature and to place greater dependence upon their resources for scientific investigation (R. 150).[50]

The police will be unable to rely on their resources for scientific investigation if they are not allowed to seize, as

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[49] Shellow, "The Continuing Vitality of the *Gouled* Rule: The Search for and Seizure of Evidence", 48 Marq. L. Rev. 172, 175. The author is a practicing attorney who is a member of the National Association of Defense Lawyers in Criminal Cases, American Judicature Society. See also, *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 109 (1966); *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 187-188, 192 (1966).

[50] See also, *Golliher v. United States*, 362 F. 2d 594, 601 (8th Cir., 1966).

part of a reasonable search, the clothing and subject it to analysis, or to take the shoes and match them with footprints discovered at the scene of a crime. It is not common sense to ask the police to rely on scientific investigation and then to completely restrict their ability to do so without having any valid reason for any such restriction. It is not logical to say that a search and seizure which is otherwise reasonable becomes unreasonable merely because in the course of a search for relevant evidence which may be classed as means, fruits or contraband, the officers also discover relevant evidence which technically does not fit into an, at best, arbitrary, illogical and confusing classification of means, fruits and contraband.

The Supreme Court of California supplies very cogent reasoning as to why the "Rule" should not be applied in any factual situation:

> "Although often invoked in cases involving the seizure of papers, the rule is not limited to papers at all but purports to prohibit the seizure of any object that is merely evidentiary. The rationale for this curious doctrine has never been satisfactorily articulated. *It creates a totally arbitrary impediment to law enforcement without protecting any important interest of the defendant.* A person has a constitutional right to be secure from unreasonable searches and seizures by the police. When the search itself is reasonable, however, it is impossible to understand why the admissibility of seized items should depend on whether they are merely evidentiary or evidentiary plus something else." (Emphasis supplied.)[51]

A review of some cases in which the very same items which are excluded by the "Rule", as applied by the majority below, are admitted under only slightly different factual situations further shows that the "Rule" is illogical.

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[51] *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 109 (1966).

There is no magic attached to non-documentary evidence such as clothing, and clothing may be seized and subjected to analysis, and the clothing or the results of the analysis may be introduced into evidence if the accused happens to be wearing the clothing when he is arrested.[52] In the Brief in Opposition to Petition for Writ of Certiorari filed on behalf of Mr. Hayden at p. 7, the Respondent argues that the cases which recognize the right of law enforcement officials to seize clothing, which a person arrested is wearing, and subject that clothing to laboratory analysis should not be persuasive here since such a seizure doesn't subject the accused to any further burden or indignity. It must be recognized here that the seizure of the clothing from the washing machine subjected Mr. Hayden to no further burden or indignity since the officers had the right and duty to search for the money and the guns and the clothing was discovered in the course of that search. Therefore, if the reasoning behind the cases which allow the seizure of clothing if the accused is wearing it is that there is no further burden or indignity suffered, then that reasoning applies equally to the instant factual situation and therefore the majority Opinion below improperly excluded the clothing from evidence.

The dissenting Opinion questions how the clothing was "instantaneously immunized" by Mr. Hayden's disrobement (R. 146). The instantaneous immunizing is even more surprising in view of the fact that the reason for his disrobement was to avoid detection.

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[52] *Hancock v. Nelson*, 363 F. 2d 249 (1st Cir., 1966); *Golliher v. United States*, 362 F. 2d 594, 599-600 (8th Cir., 1966); *United States v. Caruso*, 358 F. 2d 184 (2d Cir., 1966); *Leek v. State of Maryland*, 353 F. 2d 526 (4th Cir., 1965); *Whalem v. United States*, 346 F. 2d 812 (D.C. Cir., 1965), cert. den. 382 U.S. 862, 15 L. Ed. 2d 100 (1965); *Robinson v. United States*, 283 F. 2d 508 (D.C. Cir., 1960), cert. den. 384 U.S. 919, 5 L. Ed. 2d 259 (1960).

Even if clothing is found in the search of a premises rather than the search of a person, if the court is willing to stretch the point far enough to call the clothing means or instruments of committing the crime, the clothing is seizable and is admissible.[53] Some federal courts allow the seizure and use in evidence of clothing under factual situations similar to the instant situation without engaging in the fiction of extending the normal concept of what is a means or instrument of committing a crime.[54]

Even where documentary evidence is involved, the same illogical distinction is made in some cases, since documentary evidence may be seized if found on the person.[55] Documentary evidence also may be seized in a search of the premises and used in evidence if it can be classed as means, fruits or contraband.[56]

If the majority below had believed as did the dissent that the clothing had been used as a disguise, the majority would have held that the clothing was subject to seizure

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[53] E.g., *United States v. Guido*, 251 F. 2d 1, 3 (7th Cir., 1958), cert. den. 356 U.S. 950, 2 L. Ed. 2d 843 (1958) where the shoes worn at the time the crime was committed were held to be implements or means of committing the crime and, therefore, subject to seizure. The entire confusing area of when an item is an instrumentality and when the same item is not an instrumentality is discussed in the next section of this Brief.

[54] E.g., *Trotter v. Stevens*, 241 F. Supp. 33, 40-41 (E.D. Ark., 1965), aff'd 361 F. 2d 888 (8th Cir., 1966). In that case articles of clothing in the possession of accused rapists and not being worn by them were held to be seizable. The "Rule" was not mentioned.

[55] *United States v. Kirschenblatt*, 16 F. 2d 202-203 (2nd Cir., 1926).

[56] *Abel v. United States*, 362 U.S. 217, 4 L. Ed. 2d 668, rehearing denied 362 U.S. 984, 4 L. Ed. 2d 1019 (1960); *United States v. Rabinowitz*, 339 U.S. 56, 94 L. Ed. 653 (1950); *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947); *Zap v. United States*, 328 U.S. 624, 90 L. Ed. 1477 (1946); *Marron v. United States*, 275 U.S. 192, 72 L. Ed. 231 (1927). See also the next section of this Brief.

as being a means of committing a crime (R. 139, 147-148).[56a] Since there was no objection to the introduction of the clothing into evidence at the trial, there was never any need at the trial to show that the particular clothing in the instant case was used as a disguise. However, the fact that Mr. Hayden wore something like a uniform in the course of a robbery on the premises of a cab company, and that he wore a cap, suggests that Mr. Hayden at least selected his attire for the robbery with some thought of avoiding detection. Therefore, the statement in the majority Opinion at R. 139 that there is no contention that the clothing was used as a disguise is unfair since it was never an issue raised at any factual hearing which would have given the State the opportunity to produce evidence that the clothing was used as a disguise. None of the witnesses were able to see enough of Mr. Hayden to positively identify him and this also suggests that the clothing was effective as a disguise.

Even though none of the witnesses actually saw the gun, it was seizable; and yet, all of the witnesses saw and were able to identify the clothing, and the majority below held it was not seizable in a reasonable search. It is apparent that any reasonable man in the position of the officer here would have felt it his duty to seize the clothing, which fit the description of what the robber was wearing and bore evidence that it was discarded in haste. It would place an unreasonable burden upon an officer, without any apparent justification for placing the officer on the horns of a dilemma, to require him in an emergency situation, such as the one in the instant case, to attempt to determine whether an item he knows is relevant can be classed as means,

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[56a] In *United States v. Guido*, 251 F. 2d 1, 3-4 (7th Cir., 1958), cert. den. 356 U.S. 950, 2 L. Ed. 2d 843 (1958), the Court recognized the difficulty in distinguishing between a mask and a hat which may have been pulled down upon the face of a robber.

fruits or contraband. Placing the officer on the horns of such a dilemma does not protect either the privacy or dignity of those suspected or accused of crime and will continue to confuse and confound law enforcement officers, attorneys representing persons accused of crimes, and the courts.

Using the authorities cited above to determine when certain items are seizable and when they are not, the State has constructed a hypothetical situation which illustrates how artificial and illogical the result under the "Rule" can be. The hypothetical situation varies the instant factual situation somewhat in order to present a complete picture:

> A rapes B at knife point while wearing a Batman mask and takes $50.00 from her purse. Other than the Batman mask, A is dressed in normal street clothes. B screams and the police arrive at the scene. A runs off and B points to A and says, "That masked man raped me at knife point and robbed me." The police follow A and A runs into a house. A takes off his pants and the mask and is about to take off his shirt when the police knock at the door and are admitted by A's wife. Before the police enter the room, A throws the pants with the $50.00 in the pocket and the knife and the mask under a chair near the entrance to the room. When the police enter the room, A is sitting on the chair, clad in his shirt and underwear, reading a newspaper. The police observe the pants and the knife under the chair. The officers can see that the pants are semen stained and also contain blood stains. They therefore arrest A and take the knife, the pants and the shirt. When they pick up the pants they see the mask and also seize the mask. They find the $50.00 in the pocket of the pants. Subsequent laboratory analysis identifies the blood stains on the pants as the same type as the blood of B. A is required by the police to submit the withdrawal of his blood by a

physician to determine his blood type. His type differs from the type found on his pants.

B is interviewed after the arrest and says her assailant had an emission during the rape. If the "Rule" is applied, as the cases which feel constrained to follow the "Rule", state that the "Rule" must be applied, the police properly seized the knife, the mask, the shirt, and the money found in the pocket of the pants,[57] but they improperly seized the pants. It was also proper to require the blood test. With regard to the rape, the pants are the most vital item of evidence of all the items found under the chair. The shirt proves nothing as to the rape; the money has nothing to do with the rape; and anyone may own a knife or a Batman mask (especially if one has young children). The pants are evidence that there had been an emission, which corroborates B's story, and also contained blood of the same type as B. Both factors may help substantiate any testimony of B as to penetration. A's blood test is meaningless without the use of the pants.

The "Rule" in such situations just "creates a totally arbitrary impediment to law enforcement without protecting any important interest of the defendant."[58] It is impossible to conceive that an amendment to the Constitution which asks for reasonableness, requires such an unreasonable, ludicrous and tragic result.

F. THE "RULE" CAUSES MUCH CONFUSION AND INCONSISTENCY.

The one area which has caused the most confusion and inconsistency in the application of the "Rule" is the determination of what items are means or instrumentalities of

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[57] If the money taken by Hayden was found in the pocket of his pants which the officer found in the washing machine, the majority below would have allowed the seizure of the money but still would not have allowed the seizure of the pants.

[58] *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 109 (1966).

committing a crime.[59] This Court itself has had great difficulty in deciding when a particular item is an instrumentality and when it is not.

In *Marron v. United States*, 275 U.S. 192, 72 L. Ed. 231 (1927) this Court found that ledgers and bills for gas, electric light, water and telephone service were the instrumentalities of the operation of an illegal liquor business. However, in *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932), this Court found similar bills, ledgers and an address book not to be instrumentalities of an illegal liquor business. This Court has recognized that the cases "in this Court cannot be satisfactorily reconciled."[60]

The lower federal courts have exhibited the same confusion and inconsistency in determining when an item is and when it is not an instrumentality of the crime.[61] This confusion and inconsistency have caused the author of a Note which generally approved the "Rule" to state:

> "Thus, more than 30 years after *Marron*, practicing attorneys and others alike, are without clear Supreme Court pronouncement. In the main, the question has been silently delegated to the circuit and district courts for development and embellishment. This has led to the

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[59] Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 609. Shellow "The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence", 48 Marq. L. Rev. 172, 175.

[60] *Abel v. United States*, 362 U.S. 217, 235-238, 4 L. Ed. 2d 668, 684-685, rehearing den. 362 U.S. 984, 4 L. Ed. 2d 1019 (1960). In *Abel* this Court held that a birth certificate was an instrumentality of the crime of espionage because it could be used to pose as an American citizen. See also Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 611.

[61] Shellow, "The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence", 48 Marq. L. Rev. 172, 176-179. Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 609-611.

> growth of several different approaches, often producing contradictory and irreconcilable results.[62]

In the case of *United States v. Guido*, 251 F. 2d 1, 3-4 (7th Cir. 1958) cert. den. 356 U.S. 950, 2 L. Ed. 2d 843 (1958), the 7th Circuit held that the shoes worn during a robbery were part of the means of committing the crime. The majority Opinion below in discussing *Guido* stated:

> "Judges, aware of the practical problems faced by police officers and prosecutors in the performance of their duties, have sometimes strained mightily to overcome the exclusionary effect of the mere evidence rule by stretching to the point of distortion the category of 'instrumentalities of crime,' in order to achieve the admission in evidence of articles manifestly of evidential value only . . . While the result in a particular case may not be unreasonable, it can hardly be squared with the pronouncements of the Supreme Court." (R. 144).

The dissenting Opinion below presented very cogent reasoning why the result achieved in *Guido* was more reasonable under the circumstances than the result achieved by the majority Opinion in this case (R. 148). But reasonable men should not have to "strain mightily" and use "distortion" to evade or avoid the "Rule". A "Rule" which requires reasonable men to do this is itself unreasonable and should be, as the entire Court below suggests, re-examined and re-interpreted (R. 144, 150).

The State courts also have had considerable difficulty in determining what is and what is not an instrumentality of committing a crime. In *State v. Chinn*, 231 Ore. 259, 373 P. 2d 392 (1962) a camera, soiled bed sheets and empty beer

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[62] Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 611. See also Comment, "Limitations on the Seizure of 'Evidentiary Objects' — A Rule in Search of a Reason", 20 U. Chi. L. Rev. 319, 322.

bottles were held to be the means of committing statutory rape.[63] In the case of *Schweinefuss v. Commonwealth*, 395 S.W. 2d 370, 375-376 (Ky. 1965) the Court held that "washing pans and utensils, mouth wash, vaseline, towels, cards used by the prostitutes, money bags, and prophylactic contraceptive devices" were implements of committing prostitution and were, therefore, subject to seizure under a search warrant.

It is, therefore, apparent that if a court is willing to define instrumentality broadly enough it can avoid the "Rule". This results in unequal treatment afforded to persons accused of crimes. A "Rule" which encourages such unequal treatment promotes injustice rather than justice. However, some apologists for the "Rule" even suggest that such distortion and deception be expanded in order to help save the "Rule". In a Comment which seems to favor retention of the "Rule", the author suggests:

> "By broadly defining 'instrumentality' courts can admit evidence despite any formal requirements of the doctrine, while at the same time can leave open the door to the protection of privacy."[64]

The State contends that if even advocates of the "Rule" boldly suggest that the courts use such artificial means to avoid the "Rule", then the "Rule" itself is illogical or at least has outlived its usefulness.

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[63] At the time of the decision in *State v. Chinn*, Oregon had a statute which was similar to Rule 41(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. 41(b), and apparently stretched the normal concept of what would be instrumentality in order to avoid the "Rule". It is interesting to note that shortly after the decision in *State v. Chinn*, Oregon amended its statute to specifically authorize the issuance of a search warrant to seize evidence of crime. See Comment, "Search and Seizure of 'Mere Evidence' — Amendment to Or. Rev. Stat. Sec. 141.010 — Effect on Prior Law and Constitutionality", 43 Ore. L. Rev. 333 (1964).

[64] Comment, "The Fourth and Fifth Amendments — Dimensions of an 'Intimate Relationship'", 13 U.C.L.A. L. Rev. 857, 861.

The dissenting Opinion in the instant case points out that while clothing might not be considered an instrumentality of the crime in all cases, under the facts here, the clothing should have been considered an instrumentality of committing the crime (R. 147-148). In the instant case Mr. Hayden disrobed immediately upon entering the house in order to avoid detection. He was relying on his near nudeness to establish the fact that he could not have committed the crime. The officers should have been allowed to testify that the clothing was found in such a condition that it showed that it was hastily discarded in order to overcome Mr. Hayden's reliance on his near nudeness. If the police could testify about the condition in which they found the clothing they should have been allowed to introduce the clothing in evidence. Such use of the clothing in evidence subjected Mr. Hayden to no further burden or indignity.

The State has contended that the clothing here was used by Mr. Hayden as a disguise and was an instrumentality of crime. Where a "Rule" requires such a difference in result based upon a fine distinction as to whether clothing was or was not used as a disguise, there is obviously reason to be suspicious of its validity and wisdom.

The Supreme Court of California points out that the "Rule" has been distinguished to the point of extinction by the instrumentality exception.[65] Both the Supreme Court of California and the Supreme Court of New Jersey question how an officer can determine whether an item is an instrumentality or not, since the determination of whether or not it is an instrumentality should be made at the trial.[66]

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[65] *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 112.

[66] *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 111; *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 187.

It has been suggested that the reason why instrumentalities may be taken is "an expansion of the ancient concept of deodand", whereby anything used in the commission of a crime is forfeited to the state.[67] Such an ancient concept really has no validity in modern times. In addition, it would appear that utilization of the deodand concept would authorize the seizure of the clothing here, because it was used during the commission of a crime and should be forfeited to the State.

The "Rule" thus creates confusion and causes injustice. One man may be convicted because his clothing was technically considered to be an instrumentality of a crime and another man may be acquitted because the police are not allowed to introduce his clothing as an instrumentality of committing a crime. Therefore, the "Rule" should be abandoned unless it serves some useful purpose. In the next section of this Brief the State will contend that the "Rule" does not even accomplish the purpose its apologists attribute to it.

G. The "Rule" Does Not Accomplish Any Legitimate Purpose.

Most apologists for the "Rule" quote the last paragraph of an Opinion by Learned Hand in the case of *United States v. Poller*, 43 F. 2d 911, 914 (2d Cir., 1930) to justify application of the "Rule". In this paragraph, this distinguished jurist recognized that there is no "sound policy" for the "Rule", but at the time he wrote the Opinion in 1930, he thought the "Rule" might have an effect which apparently it has not accomplished. The full quotation is set forth below:

> "In conclusion it is only fair to observe that *the real evil aimed at by the Fourth Amendment is the search*

[67] *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 187.

> *itself*, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. *If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does.* Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating a crime. The remedy may not be very extensive, but it is something, and it is all that can be given, as we understand the present decisions. *A man is certainly subject to some search of his premises upon his arrest; if it would have been better to allow nothing without warrant but a search of his person, it is too late to hold so now.*" (Emphasis supplied).

The apologists for the "Rule" do not discuss the portions of the quotation above which the State has emphasized.

Even in 1930 Judge Hand recognized that the "Rule" could do very little in limiting the quest. Subsequent events have shown that the "Rule" is totally ineffective to limit the quest. It is generally recognized that preventing the seizure of relevant evidence which cannot technically be classed as means, fruits or contraband has not limited the quest.[68] In any event, such a reason for the "Rule" is at best artificial. If it is desired to limit exploratory searches or to prevent the invasion of privacy, then this should be done directly rather than by artificial and ineffective means.[69] It is not possible to prevent exploratory

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[68] Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 367-368, 370; See also, Kaplan, "Search and Seizure: A No-Man's Land in the Criminal Law", 49 Calif. L. Rev. 474, 478-479 (1961).

[69] See Kaplan, "Search and Seizure: A No-Man's Land in the Criminal Law", 49 Calif. L. Rev. 474, 478-479, 492-493.

searches or the invasion of privacy by saying to law enforcement officials that you may search for and seize A, B and C, but you cannot in the same search seize D. In a case where A, B, C and D are all relevant evidential items that may be destroyed or removed if not seized, and when the whole purpose of any search is to seize relevant evidential items before they can be destroyed or removed, there is no basis for distinction among A, B, C and D. Under the facts of the instant case the "Rule" prevented the use of vital evidence which was found in a search which was not exploratory and in which there was no further invasion of privacy than was necessary to allow the officers to search for the means of committing the crime and the fruits of the crime.

One need only read this Court's Opinion in the case of *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947) to realize that the "Rule" does absolutely nothing to limit the quest, prevent the invasion of privacy, or to limit exploratory searches. The majority Opinion below recognized that this Court in *Harris* tolerated an "intensive five hour search of all four rooms of an apartment, undertaken as an incident to a lawful arrest" (R. 137). In the course of the search, the officers discovered contraband which was totally unrelated to the crime for which the defendant was arrested and yet the search and seizure were held to be valid merely because contraband unrelated to the cause for the arrest was found. Under the "Rule", if the officers in *Harris*, during the first ten minutes of that search, had uncovered vital evidence of the crime for which Harris was being arrested in the very room in which Harris was arrested, the seizure of that evidence would be held to be unreasonable, if the evidence could not technically be classed as means, fruits or contraband.

The Supreme Court of California recognized that the "Rule" does not limit the quest and does not protect privacy. The Court said:

> "The rule does not prevent exploratory searches at all; it prohibits the seizure of mere evidence in the course of any search, reasonable or unreasonable, specific or general."[70]

Another indication that the prevention of invasion of privacy does not underlie the "Rule" is the fact the "Rule" has not been applied to the wire tapping, eavesdropping situation, and the results of any wire tapping or eavesdropping can under no circumstances be considered to be means, fruits or contraband.[71]

Whether or not there may have been some justification for the "Rule" in the past, it is obvious that there is no justification for the "Rule" today. Any purposes the "Rule" can legitimately seek to accomplish can be much better accomplished by other more direct means. When a "Rule" fails to fulfill any purpose properly ascribed to it, and at the same time causes confusion, inconsistency and injustice, that "Rule" must be abandoned.

II.

Experienced Trial Counsel, As Part of Trial Tactics, May Waive the Accused's Right To Object To The Introduction Into Evidence of Certain Items Seized.

A. MARYLAND HAS LONG HAD A PROCEDURAL RULE REQUIRING CONTEMPORANEOUS OBJECTION TO THE ADMISSIBILITY OF EVIDENCE AND THE RULE SERVES A LEGITIMATE STATE INTEREST.

Maryland law has for some time contained specific provisions requiring contemporaneous objection to objection-

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[70] *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 110.

[71] Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 369-370. Footnotes 91, 92, 93, 94.

able testimony and exhibits in order to preserve one's rights. At the present time Rule 522 d 2 of the Maryland Rules of Procedure reads as follows:

> "Every objection to the admissibility of evidence shall be made at the time when such evidence is offered, or as soon thereafter as the objection to its admissibility shall have become apparent, *otherwise the objection shall be treated as waived.*" (Emphasis supplied.)

Rule 885 of the Maryland Rules of Procedure reads as follows:

> *"This Court will not ordinarily decide any point or question which doe not plainly appear by the record to have been tried and decided by the lower court;* but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court." (Emphasis supplied.)

The above Rules have been consistently applied by the Court of Appeals of Maryland to deny relief on the grounds of waiver where a proper objection or a proper presentation of a question was not made in the trial court. E.g., *Hewitt v. State,* 242 Md. 111, 113-114, 218 A. 2d 19, 20-21 (1966); *Capparella v. State,* 235 Md. 204, 209, 201 A. 2d 362, 365 (1964); *Jenkins v. State,* 232 Md. 529, 532-533, 194 A. 2d 618, 620-621 (1963).

In *Jenkins* the Court of Appeals of Maryland specifically dealt with the failure to object to the use of evidence obtained in an illegal search and seizure. The Court pointed out that the trial in *Jenkins* took place on December 17, 1962, and that the decision in *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081 (1961) was handed down on June 19, 1961. The Court held, citing many previous cases, that under Rule 522 d 2 of the Maryland Rules of Procedure "a party waives his right by not objecting to the evidence at the time it was offered." The Court further held that the defendant was charged with knowledge of the *Mapp* case and the state procedural requirement was still effective after *Mapp.*

In the *Hewitt* case, the Court of Appeals of Maryland said:

> "We have repeatedly held and attempted to make clear that Maryland Rule 885 has useful and sound objectives. One of its purposes is to prevent the trial of cases in a piecemeal fashion, thereby saving time and expense and accelerating the termination of litigation. Since no questions concerning double jeopardy or denial of due process were raised below, we hold that these questions are not properly before us."[72]

In the case of *Henry v. Mississippi,* 379 U.S. 443, 448, 13 L. Ed. 2d 408, 413 (1965), this Court recognized that a rule requiring contemporaneous objection does serve a legitimate state interest, when this Court said:

> "The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded

[72] *Hewitt v. State,* 242 Md. 111, 113-114, 218 A. 2d 19, 20-21 (1966).

from jury consideration, and a reversal and new trial avoided."

The facts in this case show that the State has a valid interest in setting up such rules and in requiring that they be followed. If Mr. Hayden's counsel had objected at the time of trial to the introduction of clothing, if there was error it could have been corrected. Perhaps under such circumstances, even if the prosecutor felt the evidence was admissible, he might have withdrawn it, if he felt he had sufficient other evidence, rather than risk reversal on appeal.

By not objecting, Mr. Hayden deprived both the court and the State of their right to decide not to use the evidence. In addition, as we have indicated in a previous section of this Brief, there is a strong possibility that the clothing was used in such a manner that it was a disguise, which would be an instrumentality of committing a crime. Since Mr. Hayden did not object at all to the introduction of the clothing in evidence, the State did not have the opportunity to attempt to show that the clothing was used as a disguise.

The refusal to consider waiver in this case is particularly inappropriate, since it is the State's contention that the failure to object in this case was an important part of the trial tactics of Hayden's experienced trial attorney.

B. The Court Below Incorrectly Found that The Court of Appeals of Maryland Did Not Apply Its Contemporaneous Objection Rule in this Case.

In the majority Opinion below, it was stated that:

"It is unnecessary in this case to reach the question of whether Hayden voluntarily relinquished his constitutional claim, for in the state post-conviction proceedings the Court of Appeals of Maryland did not

look upon the failure to object as a bar to his constitutional claim. Instead it remanded the case to the lower court for a determination of the legality of the search and seizure. *Hayden v. Warden, Maryland Penitentiary*, 233 Md. 613, 195 A. 2d 692 (1963)" (R. 135).

The majority Opinion, however, failed to consider the manner in which the case first reached the Court of Appeals of Maryland, and failed to relate that factual situation to what the Court of Appeals of Maryland said. Mr. Hayden's trial took place on May 21, 22 and 28, 1962 (R. 92) and Mr. Hayden did not take a direct appeal from his conviction (R. 41). Therefore, the Court of Appeals of Maryland at the time it considered Mr. Hayden's Application for Leave to Appeal under the Post Conviction Procedure Act, did not have a transcript of Mr. Hayden's trial.

Since the post conviction judge had disposed of all Mr. Hayden's contentions after a hearing at which no testimony was taken, the Court of Appeals of Maryland had nothing whatever before it which would have shown exactly what took place at the trial. Therefore, the Court of Appeals of Maryland was faced with a situation where they could not be sure as to just what did happen with regard to a contemporaneous objection at the time of trial. They were also faced with the fact that in his Application for Relief under the Post Conviction Procedure Act, Mr. Hayden had indicated his dissatisfaction with the services of his attorney at trial (R. 25). Under such a situation the Court of Appeals of Maryland could not even reach the question of whether or not Rule 522 d 2 of the Maryland Rules of Procedure had been adequately complied with at the trial, without having the post conviction judge take testimony and determine the facts. The case of *Townsend v. Sain*, 372 U.S. 293, 9 L. Ed. 2d 770 (1963) had been recently decided and the Court of Appeals of Maryland was aware

that in a federal habeas corpus proceeding the federal court could only accept a state court finding if an adequate evidentiary hearing had been held. Since there was no transcript of the trial available to the Court of Appeals of Maryland, and since there had been no testimony at the post conviction hearing, the Court of Appeals of Maryland realized that the *Townsend v. Sain* test had not been met.

The exact language of the Court in remanding the case to the post conviction judge indicates that the Court of Appeals of Maryland felt limited by the fact that it did not know what actually had happened at the trial. The Court said:

> "Instead of ascertaining whether in fact there had been an illegal search and seizure, and a consequent arrest without a warrant, the hearing judge summarily disposed of the matter by stating that the question should have been raised at the trial and was not a ground for post conviction relief. *In so doing he may have gone too far.* See *Edwards v. Warden*, 232 Md. 667 and *Davis v. Warden*, 232 Md. 670. We think the question should first have been considered as one of fact rather than a question of law." (Emphasis supplied.)[73]

By just saying that the post conviction judge "may have gone too far" and remanding to the post conviction judge for a determination of the facts and a decision on whether or not he had gone too far, the Court of Appeals of Maryland did not refuse to apply the contemporaneous objection rule. The Court merely desired that a *Townsend v. Sain*, type hearing be held to determine factually whether or not the contemporaneous objection rule was applicable.

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[73] *Hayden v. Warden of the Maryland Penitentiary*, 233 Md. 613, 614, 195 A. 2d 692 (1963).

It is also interesting to note that the two cases cited by the Court of Appeals of Maryland[74] were cases in which the trial had taken place before this Court's decision in the case of *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961). The Court remanded in each case since it was obvious that a contemporaneous objection would have been unavailing, if made, since Maryland did not apply the exclusionary rule to evidence illegally seized prior to the decision in *Mapp*. In these two cases the Court of Appeals of Maryland was merely recognizing that counsel should not be required to make an objection if under the law as it exists, the objection cannot be sustained. Such a failure to make a needless objection would not necessarily bar raising the point after the law is changed. Since the Court of Appeals of Maryland did not have a transcript of Mr. Hayden's trial, the Court may have mistakenly believed that Mr. Hayden's case had also been a pre-*Mapp* trial.

After the case had been remanded and a hearing held, Mr. Hayden filed a second Application for Leave to Appeal which he later withdrew (R. 43). Therefore, the Court of Appeals of Maryland never had the opportunity to consider whether or not the contemporaneous objection rule was applicable under the facts.

Now that the transcript of the original trial is available (R. 92-127) and there has been a full hearing in the District Court, it is clear that Mr. Hayden's counsel did not object to the introduction of the clothing in evidence. There was a failure to comply with Rule 522 d 2 of the Maryland Rules of Procedure and Mr. Hayden thereby waived his right to object.

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[74] *Edwards v. Warden*, 232 Md. 667, 195 A. 2d 40 (1963); *Davis v. Warden*, 232 Md. 670, 195 A. 2d 37 (1963).

C. There Were No Exceptional Circumstances Here Which Excused Compliance With The Contemporaneous Objection Requirement.

In the case of *Henry v. Mississippi*, 379 U.S. 443, 451-452, 13 L. Ed. 2d 408, 415 (1965), this Court indicated that counsel's trial strategy could waive an accused's rights to assert constitutional claims, unless the circumstances are exceptional enough to overcome waiver. This Court said:

> "If either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see *Whitus v. Balkcom*, 333 F. 2d 496 (CA 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case."

The above quotation appears to clarify this Court's decision in the case of *Fay v. Noia*, 372 U.S. 391, 426, 439, 9 L. Ed. 2d 837, 861, 869 (1963). In *Fay v. Noia*, this Court recognized that exceptional circumstances could prevent waiver and said that counsel's decision, not participated in by an accused, does not automatically bar relief. However, when there are no exceptional circumstances, and when the choice made by counsel is logically his to make, then both *Fay v. Noia* and *Henry v. Mississippi* recognize that the choice by counsel could constitute waiver.

The State contends that there were no exceptional circumstances here which excused the failure to object and in fact the failure to object was an important part of the

trial tactics. The United States District Court for the District of Maryland, after a full hearing, determined that Mr. Hayden received adequate representation and said, at R. 45:

> "Hayden was represented at his trial by counsel of his own choosing, widely experienced in criminal cases, *who exercised his best judgment as to how the case should be tried. Hayden made no objection to his counsel or to the Court at the time, and may well be held to have waived any objections to matters of strategy and tactics.* In any event, his representation by his trial counsel was not so inadequate as to amount to a denial of Hayden's constitutional rights." (Emphasis supplied).

This finding by the District Court was not contested on appeal.

In the court below the State contended that Mr. Hayden's counsel at trial had two strategic reasons for not objecting to the admission of the clothing into evidence. The main strategic reason for not objecting is that Mr. Hayden's counsel intended to rely on mistaken identity (R. 89). In his attempt to establish that the witnesses, who could not specifically identify Mr. Hayden, had the wrong man, he cross-examined the State witnesses quite extensively as to the exact color of the clothing (R. 96, 113-114). The trial counsel's attempt to test the ability of the witnesses to distinguish colors could not have been as effective without utilization of the clothing.

While Mr. Hayden's counsel did not so state in the United States District Court for the District of Maryland, it seems apparent from the record that his strategy included another string to his bow, which required allowing the clothing to be introduced into evidence. He knew that though approximately $363.00 had been taken, and the police had arrived at Mr. Hayden's home within minutes

of the robbery, the money had not been found. It is apparent from the record that Mr. Hayden's counsel attempted to rely on the fact that after a painstaking search in such close proximity to the time of the crime, the money had not been found. He apparently hoped to create a reasonable doubt in the mind of the trier of fact.

The introduction of the various items found in the search, including the clothing, helped to establish how thorough the search had been. The trial counsel's strategy came very close to being effective since the trial judge indicated that the only missing link in the case was the fact that the money had not been found (R. 126-127). Mr. Hayden commented on this in the District Court (R. 71).

In a footnote, the majority Opinion speculated that if Mr. Hayden's trial counsel desired to show the thoroughness of the search which did not find the money he could have done so without allowing the clothing to be introduced in evidence (R. 134). However, the case of *Henry v. Mississippi*, 379 U.S. 443, 451, 13 L. Ed. 2d 408, 415, showed that trial counsel does not have to use unassailable strategy in order for there to be a waiver binding on an accused. In any event, the speculation in the majority Opinion uses hindsight to test trial tactics after there has been a conviction. If trial counsel had won an acquittal by his strategy, no one could have used hindsight to review his strategy. The *Henry* case recognizes that trial strategy is trial strategy even if it backfires.

In the *Henry* case itself this Court recognized that even strategy which backfired could bind the accused. This Court, therefore, remanded the case to the Mississippi Supreme Court in order to determine not whether counsel had consulted with the accused but whether counsel had actually failed to object as part of trial strategy. The result

is somewhat surprising since counsel in *Henry* must have recognized that he made a mistake in not objecting because he did move for a directed verdict at the close of the State's evidence and assigned as one ground, use of illegally obtained evidence. This Court pointed out that the objection at the time of the motion for a directed verdict may have accomplished the legitimate purpose of the contemporaneous objection rule. In the instant case, trial counsel did not at any time seek to change his decision not to object and never felt that the decision was a mistake. Further, since there was no objection at any time, there can be no contention that the purpose of the contemporaneous objection rule was even partially served.

The State still contends that in view of the strength of the case against Mr. Hayden, it was quite logical for his counsel to adopt the strategy with regard to showing that a thorough search did not produce the money. The majority Opinion does not in any way comment on trial counsel's main and expressed reason for not objecting. There is no effective way that counsel could have attempted to test the ability of the witnesses to determine exact colors other than by using the clothing.

Unless counsel is incompetent, an appellate court should not comment on trial strategy. The review of the entire file at leisure away from the heat of a trial is far different from making an almost instantaneous decision as to whether or not to object. If appellate courts make a practice of utilizing hindsight to criticize trial tactics of attorneys who do not gain acquittals for their clients, then defense counsel will be tempted to try every case by the book rather than try a novel approach to strategy which may represent the only chance of success in a case that is stacked against the accused. To encourage only sterile and

unimaginative defense counsel will not protect the rights of persons accused.

Many federal cases decided after this Court's decision in *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408 (1965) have recognized that decisions made by counsel as part of trial strategy may constitute a waiver binding on an accused, unless the circumstances are so exceptional that it is necessary to excuse the accused from the effect of waiver. In *Wilson v. Gray*, 345 F. 2d 282, 288-289 (9th Cir., 1965) and *Rhay v. Browder*, 342 F. 2d 345, 348-349 (9th Cir., 1965) the United States Court of Appeals for the Ninth Circuit points out that one of the most important rights that an accused has is the right to counsel, and that many of the decisions which must be made during the course of a trial must be made by counsel if an accused is to be adequately represented. Therefore, in both cases it was held that where counsel has made a decision as part of trial strategy, it is binding upon the accused, and can effectively waive the accused's rights to litigate a constitutional claim. In *Rhay v. Browder*, 342 F. 2d 345, 349 (9th Cir., 1965) it was stated:

> "And we think that it inevitably flows from them that, when a defendant has counsel, as Browder did, it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is of the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there."[75]

In the case of *Nelson v. People of the State of California*, 346 F. 2d 73, 78-79 (9th Cir., 1965) the court held that the

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[75] See also *Campbell v. United States*, 355 F. 2d 394, 396 (7th Cir., 1966); *Henderson v. Heinze*, 349 F. 2d 67, 69 (9th Cir., 1965); *Mirra v. United States*, 255 F. Supp. 570, 575 (S.D. N.Y., 1966).

decision by counsel in the state court not to raise certain constitutional questions was binding upon the accused, and constituted a "deliberate bypass" even though counsel's decision was objected to by the accused at the time. The court recognized that this Court's decision in *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408 (1965) did place certain limitations on certain very broad language in the case of *Fay v. Noia*, 372 U.S. 391, 439, 9 L. Ed. 2d 837, 869 (1963).[76]

The Court in *Nelson* considered the relationship between counsel and accused at a trial and stated, at page 81:

> "Does the fact that here there was prior consultation with the accused, and that he disagreed with counsel's strategy, make a legal difference? This question has not been before the Supreme Court. Our view is that the result should be the same. Our reasons are that only counsel is competent to make such a decision, that counsel must be the manager of the law-suit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel . . . One of the surest ways for counsel to lose a law-suit is to permit his client to run the trial. We think that few competent counsel would accept retainers, or appointment under the Criminal Justice Act of 1964, to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right." (Footnotes and citations omitted.)

There was, of course, no claim of bad faith in the instant case. The United States District Court for the District of Maryland found that counsel was competent and this finding was not disputed on appeal (R. 45). It was, therefore,

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[76] *Nelson v. People of the State of California*, 346 F. 2d 73, 79 (9th Cir., 1965).

apparent that there were no exceptional circumstances which would excuse the failure to make a contemporaneous objection and, therefore, the failure to object should have been held to constitute a waiver by Mr. Hayden.

This Court, as recently as the case of *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 916-917, footnote 9, has recognized that the failure to object at trial did waive the accused's right to raise certain constitutional claims arising out of a prosecutor's comments that he had refused to submit to a "breathalyzer" test. This Court did not find it necessary to send the case back to the state court to determine whether or not there had been a knowing waiver. This Court apparently assumed that the failure to object without the showing of any exceptional circumstances did constitute waiver.

CONCLUSION

For all the reasons hereinabove stated, the State of Maryland respectfully submits that the judgment below should be reversed, and the decision of the United States District Court for the District of Maryland, denying the relief prayed in the Petition for a Writ of Habeas Corpus should be affirmed.

Respectfully submitted,

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